A Matter of Context: Casey and the Constitutionality of Compelled Physician Speech

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ABSTRACT

The last few years have seen an increasing number of States seek to regulate abortion procedures—from heart auscultation statutes to admitting privileges to minimum facility standards. One such regulation has involved “speech-and-display” statutes, which require physicians to conduct an ultrasound, display the sonogram images to a woman considering an abortion, and describe the anatomical features that are visible in the image. In addition to asserting traditional due process claims, physicians have challenged these ultrasound requirements on First Amendment grounds, arguing that speech-and-display laws compel physicians to engage in speech activity against their will and (sometimes) against their medical judgment.

Although *Casey* considered and rejected a physician’s First Amendment speech challenge to a Pennsylvania informed consent provision, the plurality did so in one relatively short paragraph. The federal courts, therefore, have struggled to determine the proper standard to apply to compelled disclosures related to the practice of medicine. The Fifth Circuit, applying a form of rational basis review, upheld Texas’s speech-and-display law, while the federal District Court for the Middle District of North Carolina struck down North Carolina’s speech-and-display statute under strict scrutiny.

This Article contends that, under the Supreme Court’s First Amendment speech precedents, the context in which the compelled disclosures occur determines the proper level of scrutiny. To the extent that the government seeks to regulate speech on matters of public concern—which, as *Connick v. Myers* notes, “occupies the highest rung of the hierarchy of First Amendment values”—strict scrutiny applies. But if the government attempts to regulate speech on private matters, including the speech between professionals and their clients, then a lower standard applies. In particular, *Casey* and *Zauderer* instruct that, although compelled disclosures “implicate” a physician’s First Amendment rights, where the government has a special interest in regulating the given activity and does not limit public discussion generally, compelled disclosures are subject only to rational basis review. Thus, given that (i) the State has a special interest in regulating the medical profession and (ii) speech-and-display laws require physicians to provide truthful information about the gestational age and anatomical features of the fetus but

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do not limit their ability to comment (privately or publicly) about their views on abortion, such laws are subject to—and should survive—rational basis review.

INTRODUCTION

The First Amendment states that “Congress shall make no law … abridging the freedom of speech.”\(^1\) Given the myriad ways in which freedom of speech can be implicated, the United States Supreme Court has not adopted a single standard for reviewing First Amendment speech claims. With respect to compelled speech, the Court has instructed that “context” is dispositive.\(^2\) When the government attempts to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,” the Court applies strict scrutiny.\(^3\) When, however, “the State has a significant role to play in regulating”\(^4\) a particular context, government-compelled disclosures may be subject to a lower standard of review: “When a state regulation implicates First Amendment rights, the court must balance those interests against the State’s legitimate interest in regulating the activity in question.”\(^5\)

Determining which level of scrutiny applies to compelled disclosures in a given context, therefore, is critical because the government rarely (if ever) survives strict scrutiny under the Court’s First Amendment speech precedents. In recent years, the need to decide on the correct level of scrutiny has manifested itself in relation to regulations of abortion. Several States have enacted “speech-and-display” statutes, which require physicians to conduct an ultrasound, display the sonogram images to a woman considering an abortion, and describe the anatomical features that are visible in the image.\(^6\)

These speech-and-display statutes have been challenged not only on traditional due process grounds, but also on First Amendment speech grounds. To trigger strict scrutiny instead of Casey’s undue burden test, physicians have argued that these mandatory ultrasound statutes constitute compelled speech because physicians are required to display and explain the sonogram images. Yet to say that the First Amendment speech right is implicated is not to specify the governing level of scrutiny. Given that context matters, to determine the proper level of scrutiny,

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1 U.S. Const. Amend I.
courts must focus on the context at issue in speech-and-display statutes—disclosures related to the practice of medicine.

In this context, *Casey* provides the governing First Amendment standard. Although frequently overlooked, *Casey* expressly ruled on a First Amendment challenge to compelled abortion-related disclosures within the physician-patient relationship. In *Casey*, the Court invoked *Wooley* for the proposition that “the physician’s First Amendment rights not to speak are implicated,” but the Court emphasized that the physician’s speech rights are implicated “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”

This Article contends that, in the context of the practice of medicine, compelled disclosures generally do not impose an undue burden and, consequently, are subject only to “reasonableness” or rational basis review under *Casey*. Given that the Supreme Court has applied different levels of review in different First Amendment contexts, courts and commentators have understandably struggled to determine the proper standard to use in particular cases, including challenges to speech-and-display laws. This Article maintains that within the practice of medicine, a lower standard of review is mandated by *Casey* as well as the Court’s reasoning in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* and *Whalen v. Roe*. As in the commercial speech context in *Zauderer*, the government has a significant role to play in regulating the medical profession, and the disclosures required by speech-and-display statutes do not prevent professionals from publicly expressing their views about the required disclosures or any other issue. As in *Whalen*, the physicians’ rights are derivative of the woman’s. Thus, although *Casey*’s undue burden test applies, speech-and-display disclosures do not constitute an undue burden because it cannot “be said that any individual has been deprived of the right to decide independently, with the advice of [her] physician,” whether to have an abortion. And given that there is no undue burden, rational basis review applies in the context “of the practice of medicine” because, as *Casey* instructs, physicians are “subject to reasonable licensing and regulation by the State.”

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7 *Casey*, 505 U.S. at 884.
8 *See Zauderer*, 471 U.S. 626, 651 (1985) (recognizing that disclosure requirements aimed at misleading commercial speech need only be “reasonably related to the State’s interest in preventing deception of consumers”).
9 *See Pickup*, 740 F.3d at 1231 (“Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review …. *See Casey*, 505 U.S. at 884.”
11 *Casey*, 505 U.S. at 884. *See also Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733-34 (8th Cir. 2008); and *Pickup*, 740 F.3d at 1231.
I. UNDER CASEY, COMPULLED DISCLOSURES RELATING TO THE PRACTICE OF MEDICINE ARE SUBJECT TO RATIONAL BASIS REVIEW.

When analyzing the constitutionality of compelled physician speech, Wooley v. Maynard is a natural starting point for at least two reasons. First, Wooley is one of the Court’s seminal compelled speech cases. In Wooley, the Court struck down a New Hampshire statute requiring its citizens to carry the State’s motto, “Live Free or Die,” on their vehicles’ license plates because it forced citizens to be a mobile billboard for the State’s ideological message. As the Court explained, the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”12 While not specifying the level of scrutiny for every circumstance, the Court made clear that under the facts of that case, an individual could not be forced to be a courier for the government’s message. Second, Casey expressly invokes Wooley when addressing the physicians’ First Amendment challenges to a Pennsylvania statute requiring them to provide information about the risks of abortion and childbirth: “To be sure, the physician’s First Amendment rights not to speak are implicated, see Wooley v. Maynard.”13

Because the Court has “long recognized that not all speech is of equal First Amendment importance,”14 to say that the First Amendment is implicated is not to specify the proper standard for reviewing such First Amendment claims: As the Court instructed in Riley v. National Federation of the Blind of North Carolina, Inc., the context of the speech determines the proper standard of review: “Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.”15 Thus, to know what level of scrutiny applies to speech-and-display laws, courts must consider “the nature of the speech” and the impact that the compelled statements have on the practice of medicine.

Given that the Supreme Court has used different standards of review in different contexts, determining the proper standard for compelled disclosures in the speech-and-display context has proven difficult. Courts have struggled to discern the proper way to determine which level of review to apply to specific compelled disclosures.16 This Article contends that Zauderer and Whalen are instructive in this regard but have largely been overlooked in the cases and secondary

12 Wooley, 430 U.S. at 714.
13 Casey, 505 U.S. at 884 (citing Wooley, 430 U.S. 705 (1977)).
15 Riley, 487 U.S. at 796; Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore, 721 F.3d 264, 286 (4th Cir. 2013) (quoting Riley and confirming that “context matters”).
16 See, e.g., Wollschlaeger v. Governor of Florida, 2014 WL 3695296 at *3 (11th Cir. 2014) (noting that the district court struck down on First Amendment grounds a statute, which limited the ability of medical practitioners to record information or inquire about firearm-ownership if not necessary to providing good medical care, “regardless of whether strict scrutiny or some lesser standard applied”).
literature. Zauderer demonstrates that the level of scrutiny is connected to the type of speech as issue. Where the government has a recognized interest in regulating a given commercial or professional context and does not otherwise restrict public expression by the compelled speaker, it has greater latitude to require disclosures relating to that profession. Whalen focuses more specifically on the medical context, recognizing that the physician’s rights are derived from those of her patient and that regulations which leave the ultimate decision to the patient need be only reasonable. Thus, the Court’s teachings in Zauderer and Whalen help to explain why Casey established “reasonableness” (which this Article contends is a form of rational basis review), not strict scrutiny, as the proper standard for speech-and-display statutes.

A. The role of context in determining the level of scrutiny for compelled disclosures related to the practice of medicine.

Although Wooley does not consider compelled disclosures related to the practice of medicine, it provides important insight into the role that context plays in the Court’s determination of what level of review to apply. Wooley frequently is invoked for the general proposition that the government cannot compel individuals to speak a government message.\textsuperscript{17} A closer evaluation of Wooley, though, shows that the decision is focused more narrowly on the constitutional problems raised by forced “public” disclosure. From its framing of the question presented\textsuperscript{18} to its ultimate holding, the Court emphasized that the constitutional violation was connected to the government’s forcing the Maynards to promote the State’s motto publicly. Requiring motorists to display “Live Free or Die” on their license plate violated the First Amendment because it “forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”\textsuperscript{19} As a result, in Wooley, the constitutional violation arose because the State sought to force the Maynards to “use their private property as a ‘mobile billboard’ for the State’s ideological message,” displaying that message “to hundreds of people each day.”\textsuperscript{20} Under these circumstances, the Court applied strict scrutiny and struck down the mandatory display requirement.

\textsuperscript{17} See, e.g., Stuart v. Loomis, 2014 WL 186310 at *7 (M.D.N.C. 2014) (stating that Wooley stands for the proposition that “the state cannot compel a person to speak the state’s ideological message”); Id. at*5 (“The First Amendment generally prohibits the government from requiring people to speak its messages.”).

\textsuperscript{18} See Wooley, 430 U.S. at 713: “We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”

\textsuperscript{19} Id. at 715 (emphasis added).

\textsuperscript{20} Id.
But the majority indicated that its analysis would be different in situations where the
government did not mandate public adherence but instead sought to advance other legitimate
interests. For example, near the end of its decision, the majority considered whether its holding
would require the government to remove the national motto, “In God We Trust,” from United
States coins and currency. While recognizing that the question was not before the Court, the
majority noted that currency “differs in significant respects from an automobile.” 21 Specifically,
the majority concluded that currency did not violate the Constitution because, unlike an
automobile, currency does not require one to promulgate publicly the government’s message:
“Currency is generally carried in a purse or pocket and need not be displayed to the public. The
bearer of currency is thus not required to publicly advertise the national motto.” 22 Similarly, the
majority distinguished the use of a State seal or official stamp that “might contain, albeit
obscurely, a symbol or motto having political or philosophical implications.” 23 In this context,
the Court indicated that the First Amendment concerns animating its license plate decision were
not present because the government was not forcing anyone to promulgate its message: “The
purpose of such seal, however, is not to advertise the message it bears but simply to authenticate
the document by showing the authority of its origin.” 24

In both of these examples, the majority strongly suggested that, because currency and State
seals do not mandate public affirmation of the government’s message, the government could
more easily justify such compulsions. That is, the Court suggested that something less than strict
scrutiny would apply where the government compels speech but does not force citizens to
“publicly advertise” the government’s message.

The Court confirmed this interpretation of the First Amendment in Zauderer, in which the
Court considered the constitutionality of speech compulsions, this time in the context of
commercial advertising. In Zauderer, the State of Ohio required attorneys who advertise that
they are willing to represent clients on a contingent-fee basis “to state that the client may have to
bear certain expenses even if he loses.” 25 The plaintiff contended that the Court should subject
the disclosure requirement to heightened scrutiny, requiring the government to show “that the
disclosure requirement directly advances the relevant governmental interest and that it
constitutes the least restrictive means of doing so.” 26

21 Id. at 717 n.15.
22 Id.
23 Id. at 715 n.11.
24 Id.
25 471 U.S. at 650.
26 Id.
The Court declined the invitation and applied only a reasonableness standard after carefully considering “the nature of the speech as a whole.”\textsuperscript{27} The Court focused on two features of the speech. First, the Court recognized that the government has an important interest in regulating commercial speech. Because the State sought only to specify “what shall be orthodox in commercial advertising,” the interests at stake were “not of the same order as those discussed in \textit{Woolley}, \textit{Tornillo}, and \textit{Barnette}.”\textsuperscript{28} Although the mandatory disclosures required attorneys “to provide somewhat more information than they might otherwise be inclined to present,” that information was “factual and uncontroversial information” about the fees for legal services.\textsuperscript{29} Second, the speech compulsion did not limit an attorney’s ability to convey information to the public. Given that “disclosure requirements trench more narrowly on an advertiser’s interests than flat prohibitions on speech,” the Ohio requirement did not violate the First Amendment. Attorneys remained free to express all sorts of information about their practice and fees without government interference. Accordingly, the Court concluded that an advertiser’s First Amendment rights “are adequately protected as long as disclosure requirements are reasonably related to the State’s interest,” which in the commercial advertising context was “preventing deception of consumers.”\textsuperscript{30}

In reaching this conclusion, the \textit{Zauderer} Court focused on the compelled disclosures in a specific context. Like the currency and seal examples in \textit{Woolley}, Ohio’s regulation had “not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’”\textsuperscript{31} In \textit{Woolley}’s terms, attorneys were not required to “publicly advertise” the State’s message. Instead, Ohio required attorneys to include in their advertising “purely factual and uncontroversial information about the terms under which [their] services will be available.”\textsuperscript{32}

Just as the government can require a seal on documents “to authenticate the document by showing the authority of its origin,”\textsuperscript{33} the government can require “warning[s] or disclaimer[s] … in order to dissipate the possibility of consumer confusion or deception.”\textsuperscript{34} Where the government has a special interest in regulating a given area and does not “‘prescribe

\begin{align*}
\textsuperscript{27} & \textit{Riley}, 487 U.S. at 796. \\
\textsuperscript{28} & \textit{Zauderer}, 471 U.S. at 651. \\
\textsuperscript{29} & \textit{Id.} at 650, 651. Reasonableness is a low level of review, along the lines of rational basis. The Court precludes the government’s mandating that professionals (attorneys in \textit{Zauderer} and physicians in \textit{Casey}) disclose false, misleading, or irrelevant information because such information would not be reasonable, \textit{i.e.}, rationally related to any governmental interest. \\
\textsuperscript{30} & \textit{Id.} at 651. \\
\textsuperscript{31} & \textit{Id.} (quoting \textit{Barnette}, 319 U.S. at 642). \\
\textsuperscript{32} & \textit{Id.} \\
\textsuperscript{33} & \textit{Woolley}, 430 U.S. at 715 n.11. \\
\textsuperscript{34} & \textit{Zauderer}, 471 U.S. at 651. 
\end{align*}
what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,” the government can impose disclosure requirements related to that interest without having to survive heightened scrutiny. Consequently, Wooley, Zauderer, and Casey indicate that, although the context in which the compelled speech occurs may change, the First Amendment analysis does not.

In fact, Casey echoes Zauderer’s acknowledgement that (i) the First Amendment applies even though heightened scrutiny does not and (ii) “unjustified or unduly burdensome” requirements might violate a plaintiff’s constitutional rights. But both cases also recognize that, if the government has a special interest in regulating a certain context and the disclosures are not unduly burdensome, courts should apply a lower level of review and require only that compelled disclosures be reasonably related to the government’s interest. This is why Casey states that the practice of medicine is “subject to reasonable licensing and regulation by the State.” In the context of compelled disclosures, Casey and Zauderer equate reasonableness with truthful, nonmisleading, and relevant statements.

But even when analyzing speech restrictions, the Court has connected the level of review with the nature of the speech. This is not surprising given that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” Even though “outright prohibitions” frequently are subject to strict scrutiny, the Court has acknowledged that “[e]ven protected speech is not equally permissible in all places and at all times.” As a result, the Court has reduced the burden on the government where it has a special interest in the subject matter and is not restricting the speech activity to

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35 Id. (quoting Barnette, 319 U.S. at 642).
36 The plaintiffs in Zauderer claimed that disclosure requirements should be subject to “least restrictive means” and “under-inclusive” arguments. Id. at 651 n.14. The Court rejected these heightened scrutiny requirements: “Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized…. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied.” Id.
37 Compare Id. (“We do not suggest that disclosure requirements do not implicate the advertiser’s First Amendment rights at all.”) with Casey, 505 U.S. at 884 (“To be sure, the physician’s First Amendment rights not to speak are implicated”).
38 Id.
39 Casey, 505 U.S. at 884.
40 Id. at 714 (quoting Barnette, 319 U.S. at 637).
dictate or control public discourse: “It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’”

For example, the Court’s forum doctrine is predicated on the principle that context determines the relevant constitutional standard. Speakers enjoy broad free speech rights when speaking on public streets or in parks because these locations “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Content-based restrictions in such fora are subject to strict scrutiny because “[t]he government may not regulate [speech] based on hostility-or favoritism-towards the underlying message expressed.”

As the context changes—as a speaker moves from an open forum to a limited or nonpublic forum—so do the rights of the speaker. Because these fora are not dedicated to robust and wide-open discussion on all issues but are limited either to certain groups or the discussion of specific subjects, restrictions on speech in such fora must be only reasonable and viewpoint neutral. Thus, even in the realm of speech restrictions, the Court recognizes that the proper level of scrutiny depends on where and when the speech occurs.

Similarly, the Court’s defamation jurisprudence also illustrates that the First Amendment provides greater protection to discussions about matters of public concern. Although “the compensation of individuals for the harm inflicted on them by defamatory falsehood” is a legitimate state interest underlying the law of libel,” the Court has “recognized[d] that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.” As a result, the Court imposes a high standard—actual malice—for proving defamation with respect to matters of public concern.

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42 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)). See also Thornhill v. Alabama, 310 U.S. 88, 101–102 (1940); United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (noting that the First Amendment recognizes that “false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee” but confirming that limits on false expression are permissible where “[t]he vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered” despite such limitations).

43 Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).

44 R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992). All compelled disclosures are content-based. The government mandates that particular individuals provide specific information related to a particular subject area. But Casey and Zauderer demonstrate that, if the government has a special interest in a particular context, it may require reasonable content-based disclosures related to that interest.

45 Perry Ed. Ass’n, 460 U.S. at 46.

involving public officials and public figures, reflecting “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

If the allegedly defamatory speech is about a private figure, however, the Court imposes a different, more speech restrictive rule. Provided that States “do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” If the allegedly defamatory statement involves a matter of public concern, the private plaintiff still must show actual malice to recover presumed and punitive damages. If not, the allegedly defamatory speech warrants lesser First Amendment protection: “[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. As a result, in the defamation context, the Court has emphasized that, although “such speech is not totally unprotected by the First Amendment, its protections are less stringent.” States have greater leeway to permit recovery based on negligence (or possibly even strict liability) and can allow for the recovery of presumed and punitive damages without a showing of actual malice. Thus, as with compelled speech, the nature of the alleged defamatory speech—whether it is about a public or private concern—directly determines the standard of review that the Court will apply.

This, of course, does not mean that the government can compel—or restrict—speech in one’s home or in private conversations generally. In such situations, the government lacks the special interest in regulating the public or private discussions of private citizens because such regulations would impermissibly chill discussion and debate. Because speech restrictions trench more broadly on First Amendment concerns and threaten to undermine the larger First Amendment protections, the Court will apply a more exacting standard of review.

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47 New York Times Co., 376 U.S. at 270. See also Snyder v. Phelps, 131 S.Ct. 1207, 1219 (2011) (upholding the First Amendment right of picketers at military funerals to hold signs that were offensive to many because the activity constituted speech in “a public place on a matter of public concern”).
48 Id. at 347.
49 Id. at 349.
50 Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011). See also Dun & Bradstreet, Inc., 472 U.S. at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (Or. 1977)) (“Where the concerns with public debate are absent, there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.”).
51 Id. at 760 (citing Connick v. Myers, 461 U.S. 138, 147 (1983)). A similar analysis governs the free speech rights of government employees. See also Connick, 461 U.S. at 146 (“When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”).
52 Dun & Bradstreet, Inc., 472 U.S. at 761.
Amendment goal that “debate on public issues should be uninhibited, robust, and wide-open,” the Court emphasizes that speech compulsions cannot be accompanied by speech restrictions. As the Court acknowledged in Zauderer, even if the government can compel speech in a particular context, cutting off discussion through speech restrictions may trigger heightened scrutiny. But as the Court’s forum and defamation cases demonstrate, that is not always the case. If a speech compulsion or restriction does not undermine First Amendment principles in a given context, the Court applies a lower level of review.

B. Understanding Casey through the lens of Zauderer and Whalen: Why compelled disclosures related to the practice of medicine generally are subject to rational basis review.

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance.” And Zauderer instructs that this is true for compelled disclosures as well as affirmative prohibitions on speech. Thus, to determine the proper level of scrutiny to apply to speech-and-display laws, courts must look to the Supreme Court’s discussion of compelled speech claims in the context of the practice of medicine and other professional activities. In particular, courts must look to Casey, which expressly rejected the First Amendment speech claims of physicians who objected to disclosing certain information related to abortion.

In Casey, the Court considered a Fourteenth Amendment due process challenge to the Pennsylvania Abortion Control Act of 1982, as amended, which has served as a model for informed consent provisions in various States across the country. The Pennsylvania statute required “a physician [to] inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child’” and required “[t]he physician or a qualified nonphysician [to] inform the woman of the availability of

54 See Snyder, 131 S. Ct. at 1215 (citations omitted): “Accordingly, ‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’… [W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous … because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”
55 Id. at 758.
56 Some commentators have argued that Zauderer applies only in the commercial speech context where the state seeks to prevent deception. See, e.g., Timothy J. Straub, Fair Warning?: The First Amendment, Compelled Commercial Disclosures and Cigarette Warning Labels, 40 FORDHAM URB. L.J. 1201 (2013); Nat Stern and Mark Joseph Stern, Advancing An Adaptive Standard Of Strict Scrutiny For Content Based Commercial Speech Regulation, 47 U. RICH. L. REV. 117 (2013). Given space limitations, this Article does not engage these commentators directly but seeks to explain why the reasoning in Zauderer applies more broadly to other contexts in which “the interests at stake … are not of the same order as those discussed in Wooley, Tornillo, and Barnette.” 471 U.S. at 651.
printed materials published by the State” that described the fetus and provided information about medical assistance, paternity obligations, and abortion alternatives. Among other things, Pennsylvania claimed that the informed consent provision was intended to protect the “psychological well-being” of the woman by “ensur[ing] that [she] apprehend the full consequences of her decision” and “to further [the State’s] legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed.”

The plurality upheld Pennsylvania’s informed consent requirements under its newly announced undue burden test, which was designed to safeguard the central right protected by the due process clause: “the woman’s right to make the ultimate decision.” Under the undue burden test, a State regulation is constitutional if it is reasonable and does not have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” As the plurality noted, “unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.” Under *Casey*, an informed consent regulation is reasonable if it is “truthful,” “nonmisleading,” and “relevant … to the [woman’s] decision.” Thus, at least with respect to due process claims, *Casey* subjects truthful and nonmisleading informed consent provisions that are not undue burdens to rational basis review.

Consequently, a speech-and-display provision is constitutional under the Fourteenth Amendment if it (1) does not create a substantial obstacle to a woman’s exercise of her rights and (2) is reasonable, *i.e.*, requires the disclosure of truthful, nonmisleading, and relevant information. The question is whether the standard changes when physicians challenge speech-and-display statutes under the First Amendment instead of under the due process clause of the

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57 *Casey*, 505 U.S. at 881.
58 *Id.* at 882-83.
59 *Id.* at 877.
60 *Id.*
61 *Id.* at 878.
62 *Id.* at 882.
64 *See* *Lakey*, 667 F.3d at 577 (holding that speech-and-display provisions are constitutional “[i]f the disclosures are truthful and non-misleading, and if they would not violate the woman’s privacy right” under *Casey*); *Rounds*, 530 F.3d at 734-35 (8th Cir. 2008) (interpreting *Casey* and *Gonzales* to hold that the State “can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion”).
Fourteenth Amendment. *Casey*—when considered in light of Zauderer and Whalen—demonstrates that the answer to this question is “no.” Given the nature of the compelled speech and the government’s important interest in regulating the medical profession, mandatory disclosures related to ultrasounds are subject only to rational basis review.

1. *Casey’s* applying rational basis scrutiny to compelled disclosures related to the practice of medicine is consistent with Zauderer.

Speech-and-display statutes require physicians who perform abortions to conduct an ultrasound, display the image to the woman, and provide oral descriptions of the ultrasound images. Physicians challenging these statutes on First Amendment grounds contend that (1) they are compelled to engage in government-mandated speech and (2) a woman seeking an abortion is forced to view and hear such speech even if she does not want the information or the doctor does not believe that the information is medically necessary. These physicians claim that strict scrutiny is proper under Wooley and Barnette and that speech-and-display laws fail this high standard because they are not narrowly tailored to serve a compelling government interest.

Given that the context of the compelled disclosures dictates the level of scrutiny, plaintiffs challenging speech-and-display laws cannot invoke strict scrutiny simply because the First Amendment applies. After all, *Casey* makes clear that speech-and-display laws implicate the First Amendment speech rights of physicians. But Zauderer demonstrates that strict scrutiny does not always apply to compelled disclosures. Although focused on compelled statements related to commercial speech, the Zauderer Court did not limit its First amendment analysis to commercial speech. Rather, the Court noted that “the interests at stake … are not of the same order as those in” Wooley and Barnette because Ohio had not “attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”65 A lower level of review was warranted because (1) the government had a special interest in protecting consumers in the commercial advertising context, (2) the disclosures involved factual information, and (3) the required statements did not otherwise limit attorneys’ public speech.66

The context in which physicians provide the disclosures required under speech-and-display

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65 Zauderer, 471 U.S. at 651.
66 At first glance, this last factor—whether the compelled statements otherwise limit speech—may not seem to do much work in terms of the Court’s analysis. Compelled speech does not in and of itself involve speech restrictions, so the factor would always be met in cases involving only compelled speech. The Court emphasizes this point, however, to emphasize that speech restrictions may trigger heightened scrutiny, thereby encouraging government actors not to overreach in their legislative efforts to regulate professionals, such as doctors. See also Wollschlaeger, 2014 WL 3695296 at *15 (upholding Florida’s restriction on physicians’ inquiring about firearm ownership because the “the inquiry provision places no burdens whatsoever on physicians’ ability to speak outside the physician-patient relationship”); Locke, 634 F.3d at 1191 (“There is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients.”).
laws also shows that the First Amendment interests are not of the same order as those in *Wooley* and *Barnette*. Although the propriety of abortion regulation is a matter of public concern, the physician-patient relationship involves private and confidential communications and is not directed at the unrestricted public debate of such matters. Thus, traditional First Amendment concerns regarding the promotion of public discussion are not implicated within the confines of the patient-physician relationship.  

A lower level of scrutiny, therefore, is justified for at least three reasons. First, States have “a significant role to play in regulating the medical profession” as well as “an interest in protecting the integrity and ethics of the medical profession.” Under *Casey*, States may further these interests by requiring disclosures directed as the physical and psychological health of the patient. To make sure that the decision is informed, a State might require disclosures about the procedure and the risks to those involved: “We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.” The same is true with respect to compelled disclosures relating to the gestational age and development of the fetus. In fact, in her *Gonzales* dissent, Justice Ginsburg suggests that, to the extent that the government was concerned about a woman making an informed choice whether to have an abortion, it could have “require[d] doctors to inform women, accurately and adequately, of the different procedures and their attendant risks” instead of banning the procedure altogether.

*Casey* and *Zauderer*, therefore, present specific examples of, what has become known as, the professional speech doctrine. As one commentator has described it, “when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory

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67 See Wollschlaeger, 2014 WL 3695296 at *17 (noting that “[a]lthough we accept that firearm safety may be a matter of public concern,” there was no First Amendment violation “in the context of a regulation of professional conduct that provides that the privacy of a physician’s examination room is not an appropriate forum for unrestricted debate on such matters”).
70 *Casey*, 505 U.S. at 882-83.
71 *Casey*, 505 U.S. at 882.
72 *Gonzales*, 550 U.S. at 184 (Ginsburg, J., dissenting).
73 See *Moore-King*, 708 F.3d at 569 (“the government can … regulate those who provide services to their clients for compensation without running afoul of the First Amendment”).
that they are inseparable from the practice of medicine.” 74 As the Eleventh Circuit recently explained in upholding a Florida law limiting a physician’s right to inquire about and record firearm-ownership of patients, while the First Amendment applies to speech by professionals, “[t]hese protections are at their apex when a professional speaks to the public on matters of public concern; they approach a nadir, however, when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional’s services.” 75

This doctrine traces its roots back at least to Justice Jackson’s concurrence in Thomas v. Collins:

The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency…. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. 76

According to Justice Jackson, because the State has a recognized interest in regulating certain professions, it has broad discretion when determining how best to protect the public. The State cannot restrict the rights of professionals, such as physicians, to speak generally about the practice of medicine or “make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.” 77 But as Justice White noted in his concurrence in Lowe v. S.E.C., the First Amendment does not insulate all professional speech from regulation: “The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.” 78


77 Id. Zauderer applies the same analysis to Ohio’s compelled disclosures regarding contingent-fee arrangements. The Court upheld the disclosures in Zauderer because there are “material differences between disclosure requirements and outright prohibitions on speech” and Ohio did “not attempt[] to prevent attorneys from conveying information to the public.” 471 U.S. at 650.

78 472 U.S. 181, 228 (1985) (White, J., concurring). See also Id. at 232 (White, J., concurring) (“Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment[.”).
Under the professional speech doctrine, when a professional “is providing personalized advice in a private setting to a paying client,” a regulation of the professional’s speech with a client generally is subject only to rational basis review: “A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as ‘any inhibition of the right is merely the incidental effect of observing an otherwise legitimate regulation.’”

Although the government generally cannot restrict a professional’s speech outside the professional-client relationship, speech-and-display statutes do not abridge a physician’s public commentary on any issue.

Not surprisingly, given that speech compulsions trench more narrowly on First Amendment values, speech-and-display disclosures are less intrusive on First Amendment rights than the speech restrictions that the Fourth Circuit upheld in Accountant’s Society of Virginia v. Bowman. In Bowman, the Fourth Circuit upheld as a valid regulation of the accounting profession a Virginia law that barred unlicensed accountants from using certain terms in reports, which were prepared for clients and directed at third parties. The Bowman Court explained that the critical distinction is between professional speech and speech directed at the public:

[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engaged in public discussion and commentary. Professional speech analysis applies in the former context—where a speaker ‘takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances’—not the latter.

The Virginia statute did not violate the First Amendment rights of accountants, therefore, because the regulation “restricts only communications with and on behalf of their clients.”

Similarly, the Eleventh Circuit has focused on the public or private nature of the professional’s speech: “There is a difference, for First Amendment purposes, between regulating

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79 Moore-King v. County of Chesterfield, Va., 708 F.3d 560, 569 (4th Cir. 2013).
80 Accountant’s Soc’y of Va. v. Bowman, 860 F.2d 602, 604 (4th Cir. 1988) (citation omitted); Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 459, 467-68 (1978); Lawline, 956 F.2d at 1386 (“Any abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation.”).
81 Wollschaeger, 2014 WL 3685296 at 11 (“Insofar as Plaintiffs claim a generalized interest in being able to speak freely to their patients, such conversation (if not relevant to medical care) is outside the boundaries of the physician-patient relationship.”).
82 Although the district court in Stuart characterizes Bowman as addressing only professional licensing, Stuart, 2014 WL 186310, at *7 n.15, it directly involves the regulation of professional speech. See Bowman, 860 F.2d at 605 (“The statute in question restricts only accountants’ communications with and on behalf of their clients, as a means of regulating the professional activities of non-CPAs.”).
83 Id. (quoting Lowe, 472 U.S. at 232 (White, J., concurring)).
84 Bowman, 860 F.2d at 605.
professionals’ speech to the public at large versus their direct, personalized speech with clients. Florida’s license requirement regulates solely the latter … [and therefore] does not implicate constitutionally protected activity under the First Amendment.”

The Ninth Circuit has adopted the same view: “the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that tolerance makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.”

Like the accountants in *Bowman*, physicians who perform abortions offer individualized medical advice to and have a personal nexus with their patients. Indeed, a physician “takes the affairs of a [patient] personally in hand and purports to exercise judgment on behalf of the [patient] in light of the [patient]’s individual circumstances.” Speech-and-display statutes, therefore, fit comfortably within the confines of the professional speech doctrine. As a result, speech-and-display provisions “amount to the permissible regulation of a profession, not an abridgment of speech protected by the first amendment.”

Second, consistent with the professional speech doctrine, *Casey* and *Zauderer* recognize the compelled disclosures “implicate” the First Amendment rights of the professionals who are required to provide specific information to their patients or clients. But in both cases, the Supreme Court acknowledged that the professionals’ “rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest.” In *Zauderer*, that interest was in preventing deception of consumers in the commercial speech context. In the speech-and-display context, the State has an interest is in protecting the psychological well-being of the woman considering an abortion, safeguarding the reputation of the medical profession, and promoting childbirth over abortion. Under *Casey* and *Zauderer*, compelled disclosures are reasonably related to the States’ interest if they provide truthful, nonmisleading, and relevant information.

Consistent with its treatment of “undue burden,” the Court has not provided a detailed

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85 *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).
86 *Pickup*, 740 F.3d at 1228. See also Robert C. Post, *Democracy, Expertise, and Academic Freedom* 24 (2012) (“Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than to protect the targets of speech; outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets of speech.”).
87 *Bowman*, 860 F.2d at 604 (citation omitted).
88 *Id.* at 605.
89 *Zauderer*, 471 U.S. at 651. See also *Casey*, 505 U.S. at 885.
90 *Zauderer* refers to “purely factual and uncontroversial information.” 471 U.S. at 651. In the context of professional speech, “uncontroversial” cannot prohibit disclosures related to controversial topics—otherwise *Casey* would have been decided differently.
Circuit courts have taken “truthful” to refer to factual or accurate information, i.e., information that is not false. The disclosure may involve a controversial topic but still be truthful, such as the abortion-related disclosures in *Casey*. “Relevance” imposes a low standard under the Court’s rational basis review, requiring only some minimal connection to the State’s interest. “Non-misleading” is perhaps the most opaque term. Although the Court’s commercial speech cases may shed some light on its meaning, “nonmisleading” should be understood in relation to the Court’s having “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,” including “in the abortion context.” Thus, a disclosure cannot be misleading simply because there is some dispute within the medical community about the issue.

For example, in 2005 South Dakota passed a law requiring doctors to inform a woman seeking an abortion that she faces an increased risk of suicide. Planned Parenthood challenged the compelled disclosure, arguing among other things that it violated the physicians’ First Amendment rights and was misleading because the studies allegedly supporting the disclosure did not establish a causal connection between having an abortion and an increased suicide rate. The Eighth Circuit sitting en banc upheld the statute, holding that “[o]n its face, the suicide advisory presents neither an undue burden on abortion rights nor a violation of physicians’ free speech rights.” According to the court, “[t]he disclosure is truthful, as evidenced by a multitude of studies published in peer-reviewed medical journals that found an increased risk of suicide for women who had received abortions compared to women who gave birth, miscarried, or never became pregnant.” Moreover, the advisory was “non-misleading” and “relevant to the patient’s decision to have an abortion” given that, under *Gonzales*, “a truthful disclosure cannot be unconstitutionally misleading or irrelevant simply because some degree of medical and scientific uncertainty persists.” If the required disclosure accurately reflects the studies or findings upon which the government relies, then, even though there may be disagreement within

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91 The Supreme Court has not given a precise definition of what constitutes an “undue burden” other than saying that it is a regulation that imposes a “substantial obstacle.” *Casey*, 505 U.S. 878. But even this definition is of limited value given that the Court has not necessarily applied the test consistently, upholding a 24-hour waiting period but striking down a spousal consent requirement.

92 See *United States v. Windsor*, 133 S. CT. 2675, 2717 (2013) (noting that “in rational basis cases … the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be presumed.”).


94 *Gonzales*, 550 U.S. at 163-64.

95 *Planned Parenthood Minn., North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 906 (8th Cir. 2012).

96 Id. at 905.

97 Id.
the medical or scientific community, courts seem unlikely to view the disclosure as misleading.

The same analysis applies to speech-and-display laws. Sonograms provide a truthful depiction of the fetus, and physicians are required to give only an accurate, non-misleading description of those images while retaining the ability to explain what impact the physician thinks the images should have on the woman’s decision. Unlike the suicide advisory in Rounds, there is no medical uncertainty regarding the ultrasound images. They show the anatomical features of the fetus as well as its gestational age. Consequently, although there may be situations in which the truth, misleading nature, or relevance of a disclosure is at issue, speech-and-display laws do not provide such a case. As the Fifth Circuit explained in Lakey, “[t]o belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information.”

Moreover, given that the images and descriptions are truthful, they are not misleading because they accurately reflect the fetus and its development. And under Casey, such accurate information is directly relevant to the decision whether to have an abortion: “[n]or can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to their decision.”

Third, rational basis is the appropriate level of review because speech-and-display disclosures do not restrict speech; they require physicians only “to provide somewhat more information than they might otherwise be inclined to present.”

Consistent with the professional speech doctrine and the Courts’ analysis in Zauderer, speech-and-display statutes do not prevent doctors from conveying any information to the public or to their patients—about their views on the speech-and-display laws, informed consent provisions, the decision whether to have an abortion, or any other issue. Although these statutes require medical providers to give information that they might otherwise not be inclined to present, Gonzales recognizes that a State nonetheless has a legitimate interest in providing such information: “In a decision so fraught
with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used.... It is, however, precisely this lack of information ... that is of legitimate concern to the state.”

To the extent some physicians think that the required disclosures are not medically relevant, they remain free to explain their views both to a woman seeking an abortion and to the public. In fact, such discussions may further the State’s interest in ensuring that the woman makes an informed decision: “The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole....” As in Zauderer, the free speech interests at stake in the speech-and-display context “are not of the same order as those discussed in Wooley, Tornillo, and Barnette” because these statutes do not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Consequently, Casey expressly held that the physicians’ First Amendment claims were subject only to a “reasonableness” basis review.

As discussed above, when dealing with compelled speech within the professional context, Casey applies a modified version of rational basis scrutiny reflecting the fact that the physicians’ rights are derived from their patients’ rights. If the disclosure requirements are “unjustified or unduly burdensome”—an undue burden under the language of Casey—then “disclosure requirements might offend the First Amendment.” But in general a speaker’s rights—whether the speaker is an attorney or a physician—“are adequately protected as long as disclosure requirements are reasonably related to the State’s interest.” Because speech-and-display laws, like the informed consent provisions under Pennsylvania law in Casey, are reasonably related to the States’ legitimate interests in informing the woman’s decision, regulating the medical profession, and promoting childbirth over abortion, such statutes do not violate the First Amendment rights of physicians. Physicians retain the right to engage in public counter-speech

outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets of speech.”

103 Gonzales, 550 U.S. at 159.
104 See Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60 (2006) (“Law schools remain free ... to express whatever views they may have on the military’s congressionally mandated employment policy”).
105 See, e.g., Gonzales, 550 U.S. at 160.
106 Zauderer, 471 U.S. at 651.
107 Barnette, 319 U.S. at 642.
108 See King v. Governor of the State of New Jersey, 767 F.3d 216, 236 (3d Cir. 2014) (“In the context of commercial speech, the Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny.”).
109 Zauderer, 471 U.S. at 651.
110 Id. at 651.
and private counseling with their clients free from government control. Thus, under *Casey* and *Zauderer*, States may require “the physician [to] provide the information mandated.”\(^{111}\)

2. The forgotten part of *Casey’s* First Amendment analysis: *Whalen* v. *Roe*.

Courts and commentators who contend that strict scrutiny governs speech-and-display laws tend to focus on *Casey’s* statement that “[t]o be sure, the physician’s First Amendment rights not to speak are implicated.”\(^{112}\) All too often, though, they ignore the second part of this critical sentence from *Casey*—that the right not to speak is implicated “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”\(^{113}\) Any complete account of *Casey*, though, must explain the Court’s invocation of *Whalen* v. *Roe*. In *Whalen*, the Supreme Court considered whether a New York law, which required physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the State, violated the constitutional right to privacy of prescribing physicians and their patients.\(^{114}\) Through the prescription requirement, the New York legislature sought to facilitate enforcement of laws prohibiting misuse of controlled substances and to deter those who might violate those laws.\(^{115}\) The physicians and patients filed suit, claiming that the possibility of disclosure would make “some patients reluctant to use, and some doctors reluctant to prescribe [the applicable] drugs even when their use is medically indicated.”\(^{116}\) The plaintiffs argued that the law “threaten[ed] to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.”\(^{117}\) The Supreme Court rejected these claims.

In the portion of *Whalen* to which *Casey* refers, the Court recognized that the State has broad latitude to regulate the practice of medicine provided only that such regulations do not: (1) preclude public access to a legitimate medical procedure or treatment, (2) prevent a patient from deciding, in consultation with her physician, whether to pursue the procedure or treatment,\(^{118}\) or (3) condition the doctor’s ability to pursue such a procedure or treatment on

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\(^{111}\) *Casey*, 505 U.S. at 884.

\(^{112}\) *Id.*. See *Stuart*, 2014 WL 186310 at *17 (“Despite its brevity, the First Amendment analysis is clearly a traditional one, couched by its reference to *Wooley* in terms of compelled speech and by its reference to the state’s ability to regulate the practice of medicine in terms of professional speech.”).

\(^{113}\) *Casey*, 505 U.S. at 884 (citing *Whalen*, 429 U.S. at 603).


\(^{115}\) *Id.* at 597-98.

\(^{116}\) *Id.* at 600.

\(^{117}\) *Id.* at 603 (noting that “the statute did not deprive the public of access to the drugs”).

\(^{118}\) *Id.* (“Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.”).
government consent.\textsuperscript{119} In \textit{Whalen}, as in \textit{Casey}, it is the ability of a patient to make a decision in consultation with her physician that “is at stake.”\textsuperscript{120} As long as “the decision … is left entirely to the physician and the patient,”\textsuperscript{121} the State has substantial freedom to adopt reasonable regulations that may affect the decision-making process. Moreover, the \textit{Whalen} Court determined that to the extent the compelled disclosures impaired the doctors’ “right to practice medicine free of unwarranted state interference … the doctors’ claim is derivative from, and therefore no stronger than, the patients’.”\textsuperscript{122}

Although \textit{Whalen} did not involve a First Amendment claim, \textit{Casey} applied the principles of \textit{Whalen} to compelled disclosures related to abortion.\textsuperscript{123} This is not surprising given the similarities between \textit{Casey} and \textit{Whalen}. Both cases involve claims that a State law compelling disclosures violated a patient’s Fourteenth Amendment rights in connection with a medical procedure or treatment. Both emphasize that the patient must have the right to make the ultimate decision about the medical procedure or treatment but that the State may adopt regulations—even ones that might be considered unnecessary—that affect that right. Both include allegations that the governing laws violated the rights of patients and physicians. Both indicate that the State may require physicians to engage in activities that burden the physicians’ practice of medicine. Both hold that the rights of the physician are “derivative” of those of the patient and, consequently, both summarily dispose of the physicians’ claims.

Although the derivative nature of a physician’s rights has not received much attention in the literature, it directly bears on the scrutiny analysis. As \textit{Whalen} instructs, the physicians’ rights are derivative of her patients’：“[n]othing in \textit{Doe v. Bolton} suggests that a doctor’s right to administer medical care has any greater strength than his patient’s right to receive such care.”\textsuperscript{124} Because the physician’s rights are derived from those of his or her patient, the doctor cannot receive greater protection under the First Amendment than the patient gets under the due process clause.\textsuperscript{125} In \textit{Casey}, the central concern was “the right of a pregnant woman to decide whether or

\begin{itemize}
\item \textsuperscript{119} Id.
\item \textsuperscript{120} \textit{Casey}, 505 U.S. at 877.
\item \textsuperscript{121} \textit{Whalen}, 429 U.S. at 603.
\item \textsuperscript{122} Id. at 604.
\item \textsuperscript{123} \textit{Casey}, 505 U.S. at 884 (“On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”).
\item \textsuperscript{124} \textit{Whalen}, 429 U.S. at 604 n.33. See \textit{Casey}, 505 U.S. at 884 (“[t]he constitutional status [of] the doctor-patient relation … in the [provision of abortion services] is derivative of the woman’s position.”).
\item \textsuperscript{125} Id. at 884 (holding that physicians do not garner additional protection because the “doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.”).
\end{itemize}
not to bear a child without unwarranted state interference.” 126 But *Casey* applied the undue burden test, not strict scrutiny, to the woman’s substantive due process claim. 127 The plurality held that the compelled disclosures did not unduly burden a woman’s right to choose and, consequently, that there was “no constitutional infirmity in the requirement that the physician provide the information.” 128

Under *Casey*, speech-and-display provisions also do not constitute an undue burden on a woman’s right to choose because pre-abortion ultrasounds are conducted routinely across the country. 129 These statutes require doctors to provide truthful and nonmisleading information regarding the fetus to advance the States’ important interest in the psychological health of the mother and “to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed.” 130 The speech-and-display requirements may force doctors “to provide somewhat more information than they might otherwise be inclined to present,” 131 but they do not limit the physicians’ ability to advise their patients about the import of the ultrasounds and whether they believe an abortion is appropriate under the circumstances. As a result, the woman in consultation with her physician ultimately makes the decision whether to have an abortion, which means that the speech-and-display disclosures need be only reasonable under *Casey*.

In *Stuart*, the federal district court rejected this interpretation of *Casey*, contending that subjecting the physicians’ claims to rational basis review creates a new First Amendment test: “[*Lakey* and *Rounds*] read *Casey* as creating, in two sentences, an entirely new category of abortion-related compelled speech to which a unique standard of review applies.” 132 Yet *Zauderer* and *Whalen* show that *Casey*’s application of rational basis to compelled disclosures is not novel. Although speech-and-display statutes “implicate” the physician’s First Amendment rights in the context of “the practice of medicine,” compelled disclosures are constitutional

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126 Id. at 604 n.33.
127 Id. at 884-85.
128 *Casey*, 505 U.S. at 884.
129 See, e.g., Janie Benson et al., Early abortion services in the United States: a provider survey, 67 Contraception 289, 290, available at http://www.sciencedirect.com/science/article/pii/S0010782402005127# (finding that 83% of the abortion-service sites studied always performed an ultrasound before an early surgical abortion and 92% always performed one before a medical abortion); It’s not just forced ultrasound: Abortion rights under assault, Salon.com, Oct. 21, 2012, available at http://www.salon.com/2012/10/21/its_not_just_forced_ultrasound_abortion_rights_under_assault/ (“Ultrasounds are a routine procedure at Planned Parenthood and many other clinics, a tool doctors use to gauge gestational age—which can affect which procedure to use—or to detect complications.”).
130 *Casey*, 505 U.S. at 883.
131 *Zauderer*, 471 U.S. at 650.
132 *Stuart*, 2014 WL 186310 at *17.
provided that they are “reasonable … regulation[s] by the State.”\textsuperscript{133} Given the State’s interests identified in \textit{Casey} and the fact that ultrasounds provide truthful and non-misleading images related to the gestational age and development of the fetus, speech-and-display statutes are reasonable. Although speech-and-display provisions—like any compelled disclosures—may make a physician’s work more labor-intensive and possibly less independent (because they are required to give additional information), they do not undermine the woman’s right to make the ultimate decision and, therefore, are constitutional.

II. \textit{Casey} rejects strict scrutiny and permits reasonable regulations of the medical profession.

The use of strict scrutiny not only is inconsistent with \textit{Casey}’s invocation of \textit{Whalen}, but also reintroduces the standard applied in \textit{Roe v. Wade},\textsuperscript{134} \textit{Akron v. Akron Ctr. for Reproductive Health},\textsuperscript{135} and \textit{Thornburgh v. American College of Obstetricians & Gynecologists},\textsuperscript{136} but rejected in \textit{Casey}. As \textit{Casey} notes, the \textit{Thornburgh} Court found two main problems with the informed consent provisions in \textit{Akron}: “the information was designed to dissuade the woman from having an abortion and the ordinance imposed ‘a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient.’”\textsuperscript{137} In \textit{Stuart}, the district court repeatedly contends that North Carolina’s speech-and-display provision is unconstitutional for the same reasons.\textsuperscript{138}

Like the district court in \textit{Stuart}, the \textit{Akron} Court was concerned that a physician would be required to deliver information to a woman that might be irrelevant to her particular situation.\textsuperscript{139} In \textit{Thornburgh}, the Court expressed concern that information about fetal characteristics might “serve only to confuse and punish [the woman] and to heighten her anxiety, contrary to accepted medical practice.”\textsuperscript{140} Similarly, the district court in \textit{Stuart} worried that “the Act requires providers to actually \textit{deliver} the information … to patients whose physical or mental health would be placed at serious risk.”\textsuperscript{141} \textit{Thornburgh} also suggested that requiring information about medical assistance and paternity may, “[f]or a patient with a life-threatening pregnancy, … be

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\item \textsuperscript{133}\textit{Casey}, 505 U.S. at 884.
\item \textsuperscript{134} 410 U.S. 113 (1973).
\item \textsuperscript{135} 462 U.S. 416 (1983).
\item \textsuperscript{136} 476 U.S. 747 (1986).
\item \textsuperscript{137} \textit{Casey}, 505 U.S. at 882 (citation omitted).
\item \textsuperscript{138} \textit{See}, e.g., \textit{Stuart}, 2014 WL 186310 at *12 (“[T]he Act requires providers to actually \textit{deliver} the information to every single patient who seeks an abortion, even those who object to receiving it or who would be harmed by it.”).
\item \textsuperscript{139} \textit{See Akron}, 462 U.S. at 445 (“For example, even if a physician believes that some of the risks outlined in subsection (5) are nonexistent for a particular patient, he remains obligated to described them to her.”); \textit{Thornburgh}, 476 U.S. at 762 (“The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman’s decision.”).
\item \textsuperscript{140} \textit{Thornburgh}, 476 U.S. at 762.
\item \textsuperscript{141} \textit{Stuart}, 2014 WL 186310 at *12.
\end{itemize}
cruel as well as destructive of the physician-patient relationship” and that “a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support.”

Echoing these concerns, the district court in Stuart noted that “the state would have a physician attempt to persuade a woman not to have an abortion … even if she will die if she continues her pregnancy and even if she has a mental health history that makes forced and graphic delivery of this information … a risky proposition.” In fact, the district court essentially repeats the claims of the petitioners in Casey, who argued that Pennsylvania’s informed consent statute compelled ideological speech that triggered and failed strict scrutiny because it “forced [physicians] to convey the state’s message at the cost of violating their own conscientious beliefs and professional commitments.”

The problem with this line of argument, however, is that Casey overturned Thornburgh and rejected the petitioners’ claims in Casey. Although concerns about the physical and psychological health of the woman are critically important, Casey and Gonzales confirm that the State has a central role to play in determining what information should be given:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails…. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense…. It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed.

Under Casey, reasonable disclosures relating to informed consent implicate important and controversial policy choices (whether or not the government should pass such regulations) but do not render the regulations unconstitutional unless they impose an undue burden on the woman’s decision whether to have an abortion. Subjecting such disclosures to strict scrutiny

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142 Thornburgh, 476 U.S. at 763.
143 Stuart, 2014 WL 186310, at *17. Under North Carolina’s speech-and-display legislation, a physician must show the ultrasound image to the woman and to describe the image. Contrary to the district court’s suggestion, the statute does not require that “a physician attempt to persuade a woman not to have abortion.” Physicians may counsel a woman to have an abortion or not depending on the physician’s assessment of what is in the patient’s best medical interests.
145 Gonzales, 550 U.S. at 159 (citations omitted).
146 See Lawline v. American Bar Ass’n, 956 F.2d 1378, 1386 (7th Cir. 1992) (“When employing the appropriate rational basis test, this Court does not require that the state choose the wisest policy, only that it choose a constitutional one.”).
therefore fails for the same reasons that *Casey* overruled *Akron* and *Thornburgh*—it “go[es] too far” and undervalues the State’s “important interest in potential life.”

Moreover, that *Casey* does not impose heightened scrutiny is apparent from the rational basis language used throughout the Court’s opinion. *Casey* repeatedly refers to Pennsylvania’s “legitimate goal” of protecting unborn life and acknowledges that compelled physician disclosures are permissible “as part of the practice of medicine, [which is] subject to reasonable … regulation by the State.” In fact, *Casey* never mentions, let alone discusses, any compelling interest that Pennsylvania had in requiring physicians to speak and never considers whether the Pennsylvania statute was narrowly tailored, reinforcing the Fifth, Eighth, and Ninth Circuits’ conclusion that *Casey* applies rational basis review to the physicians’ First Amendment claims. As the Fifth Circuit explains, *Casey*’s analysis is “the antithesis of strict scrutiny.”

Instead of considering whether Pennsylvania’s informed consent statute was narrowly tailored to a compelling interest, *Casey* found “no constitutional infirmity” because the required disclosures were truthful and nonmisleading. The same is true of speech-and-display provisions. Although modern ultrasounds may provide information that is “more graphic and scientifically up-to-date[] than the disclosures discussed in *Casey*,” the information “is not different in kind.” Modern ultrasounds (including more recent 3D technology) provide an accurate and detailed image of the fetus. Given that non-medical professionals might have trouble interpreting or understanding the images (especially in the first or early second term of a pregnancy), the speech-and-display statutes require physicians to describe the ultrasound images. Following *Casey*, States contend that speech-and-display provisions are reasonable regulations furthering the States’ interests in maternal health (construed under *Casey* to include psychological health) and in the potential life of the unborn.

Under rational basis review, a court need “only determine whether any conceivable rationale exists for an enactment[;] … the state is not required to ‘prove’ that the objective of the law would be fulfilled.” Post-*Casey*, a State may pursue its goals of making sure a woman’s choice is informed and protecting the life of the unborn by requiring that “a specific body of information be given in all cases, irrespective of the particular needs of the patient.” By compelling disclosure in all cases, the speech-and-display provision offers every woman who

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147 *Casey*, 505 U.S. at 882.
148 *Casey*, 505 U.S. at 884 (emphasis added).
149 *Lakey*, 667 F.3d at 575.
150 *Casey*, 505 U.S. at 884.
151 *Lakey*, 667 F.3d at 578.
153 *Casey*, 505 U.S. at 882 (citation omitted).
might consider the disclosed information unfettered access to it, while giving those who do not want the information or who think they might be harmed by it a way to opt out. To the extent the Act does not provide a sufficient safeguard in a particular case, *Gonzales* instructs that an as-applied challenged is the proper means for seeking relief: “[An as-applied challenge] is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.”154 Thus, the compelled disclosures that speech-and-display statutes require are reasonable under *Casey* and do not violate the First Amendment rights of physicians.

**CONCLUSION**

Although *Casey* is best known for its undue burden test that has governed the Supreme Court’s analysis of abortion regulations for more than twenty years, the plurality also considered and rejected a physician’s First Amendment speech challenge to a statute requiring doctors “to provide information about the risks of abortion, and childbirth.”155 In the wake of speech-and-display statutes, courts have been forced to revisit *Casey*’s First Amendment analysis and consider anew the proper standard to apply to compelled disclosures related to the practice of medicine.

To determine the proper standard, this Article contends that courts must look more carefully at *Casey* as well as other important First Amendment cases, including *Wooley*, *Zauderer*, and *Whalen*. Although compelled disclosures “implicate” a physician’s First Amendment rights, the plurality applied a form of rational basis review and did so for good reasons. As the Supreme Court has noted, the context in which the compelled disclosures occur determines the proper level of scrutiny to apply. That a lower level of scrutiny governs disclosures in the medical context follows from the Court’s recognition that the right not to speak is limited to “suitably defined areas,”156 and “there is no right to practice medicine which is not subordinate to the police power of the states...”157

*Zauderer* confirms that where the government has a special interest in regulating a given activity and does not limit public discussion generally, compelled disclosures are subject to rational basis review. Moreover, this conclusion is wholly consistent with *Whalen*, which *Casey* cites to justify holding that compelled speech “as part of the practice of medicine [is] subject to reasonable licensing and regulation by the State.”158 Thus, speech-and-display statutes are

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154 *See Gonzales*, 550 U.S. at 167.
155 *Casey*, 505 U.S. at 884.
158 *Casey*, 505 U.S. at 884.
constitutional under the Court’s First Amendment case law because the government has a significant role to play in regulating the medical profession and because such disclosures are reasonable under *Casey*, involving truthful, nonmisleading information that is meant to “further [the State’s] legitimate goal of protecting the life of the unborn [through] legislation aimed at ensuring a decision that is mature and informed.”

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159 *Id.* at 883.